Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

JOSEPH A. MAY

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the impermissible disclosure to over 2000 people of confidential tax return information by the IRS can be excused as a good faith misunderstanding under 26 U.S.C. § 7431(b) when the IRS never asserted any misunderstanding existed and/or considering no objectively reasonable basis for such a misunderstanding existed.

2. Whether the impermissible disclosure to over 2000 people of confidential tax return information by the IRS can be excused as a good faith misunderstanding under 26 U.S.C. § 7431(b) when the IRS had notice through several federal court decisions that the exact disclosure being made was impermissible.

3. Whether the disclosure to over 2000 people of the confidential tax information that May was under "official" investigation by the IRS was necessary, and if not, whether it can be excused as a good faith misunderstanding under 26 U.S.C. § 7431(b) considering such language is a deviation from the language suggested in an IRS manual and the IRS offered no explanation for the deviation.

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The opinion of the Court of Appeals issued in support of its judgment is unpublished but reported as *Joseph A. May v. United States*, 1998 U.S. App. LEXIS 2833; 98-1 U.S. Tax Cas. (CCH) ¶50,220; 81 A.F.T.R.2d 853, and is reprinted in Appendix A.

The opinion of the District Court is unpublished but reported as *Joseph A. May and Glenda S. May v. United States*, 1995 U.S. Dist. LEXIS 16204; 95-2 U.S. Tax Cas. (CCH) ¶50,605;79 A.F.T.R.2d (P-H) 7222, and is reprinted in Appendix B.

The order of the Court of Appeals denying rehearing and rejecting the suggestion of rehearing ***en banc*** is unpublished, and is reprinted in Appendix C.

JURISDICTION

The order of the Court of Appeals in this case denying the petition for rehearing was filed on April 24, 1998. This petition is therefore timely under this Court's Rule 13.3.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves application of the following statutes.

Sec. 6103. Confidentiality and disclosure of returns and return information.

(a) General rule.

Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provision of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions

For the purposes of this section—

(2) Return information. The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments [sic], or tax payments, whether the taxpayer's return was, is being, or will be

> examined or subject to other investigation or processing, or any other data, received by, recorded by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . .
>
> but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer . . .

(k) Disclosure of certain returns and return information for tax administration purposes . . .

> **(6) Disclosure by internal revenue officers and employee for investigative purposes.** An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this

> title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulations.

26 U.S.C. § 6103.

Sec. 7431. Civil damages for unauthorized disclosure of returns and return information.

(a) In General.

> **(1) Disclosure by employee of the United States.** If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States . . .

(b) No liability for good faith but erroneous interpretation.

> No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

26 U.S.C. § 7431.

STATEMENT OF THE CASE

26 U.S.C. § 6103(a) requires that May's "tax returns" and "return information" be kept confidential unless its disclosure is authorized by statute. 26 U.S.C. § 6103(k)(6) authorizes the IRS to disclose such return information as may be necessary to obtain information which cannot reasonably be obtained from other sources. This case involves written and oral disclosures of return information by IRS agents. The facts are not in dispute, and may be summarized as follows:

May was an endodontist, a dentist who specialized in root canals, who practiced in Kansas City and Jefferson City, Missouri. (B-2[1]). On May 31, 1989, IRS Revenue Agent Janice Williams was assigned to audit May for the tax years 1985-1988. (B-2). Williams reasonably determined that she would most efficiently audit May by sending a circular letter to all the dentists in the geographic areas that May worked to determine what patients those dentists had referred to May. (B-3). The circular letters asked the dentists to furnish "the [names, addresses, and phone numbers of patients referred to Dr. Joseph A. May in the period between January 1, 1985, through December 31, 1988] for use in a Federal tax matter." (B-4). Subsequently, Williams sent circular letters asking patients to furnish "[any information regarding services provided to

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[1]References are to Appendices pages of this Petition for Writ of Certiorari.

you by Dr. Joseph May, including, but not limited to, copies of, billing statements, insurance reimbursements, canceled checks, and dates of treatment] for use in a Federal tax matter." (B-4).

In November 1990, Special Agents Gary Marshall and Keir Reitter were assigned to conduct a criminal investigation of May. (B-5). Marshall determined to use a circular letter approach to determine May's gross income and expanded the investigation to include tax year 1989. (B-5). On 11/20/90, Marshall drafted a circular letter to be sent to May's patients; this letter was allegedly approved by Marshall's supervisors. (B-6). Marshall's circular letter stated: "The Internal Revenue Service is conducting an official investigation of the tax liability of Joseph A. May, DDS, Route 1, Box 16, Cleveland Missouri for the years 1985, 1986, 1987, 1988 and 1989." (A-3). The signature block and the return address on the envelope both contained the identifier "Criminal Investigation Division." (A-3). Approximately 2000 of these circular letters were mailed between November 1990 and July 1991 by Marshall and Reitter. (B-6). Prior to Marshall and Reitter's conduct, May's home address had never been released to the public, his patients, or published in any telephone directory; indeed his telephone number was not listed in his name. The Handbook for Special Agents, at that time, allowed reference to "Criminal Investigation Division" in the signature block, but suggested "The Internal Revenue Service is conducting an investigation of . . . " be used in the body of the letter. (A-3).

Marshall and Reitter also personally served summonses on various financial institutions, dental supply companies, insurance companies, utility companies, and individuals in order to establish May's income, expenditures, non-income items, deductions, and other facts. These summonses and their attachments did not bear the identifier "Criminal Investigation Division," May's home address, nor state that May is under criminal investigation.

On July 19, 1991, May filed a complaint for unauthorized disclosure of return and return information, pursuant to 26 U.S.C. Section 7431, with the U.S. District Court for the Western District of Missouri, Western Division. (A-3). The district court had federal question jurisdiction under 28 U.S.C. § 1331. The case was stayed at the United States' request until April 19, 1994, because of a criminal investigation and then prosecution against May.

Subsequent to the filing of this case, Marshall and Reitter also orally disclosed that: 1) May's practice had been completely destroyed due to their contacting all dentists that might refer patients to May; 2) a Mae Benson was May's "girlfriend"; 3) May and Mae Benson had a personal relationship; 4) May and Mae Benson had a baby; 5) Mae Benson had been brainwashed by May; 6) Marshall stated to Missouri State Judge Vernon Scoville that May had been having an affair where a woman gave birth to a child; 7) May had committed tax crimes; 8) informed witnesses they should convince May to confess to tax crimes; 9) May was facing two felonies and several

misdemeanors; 10) May would spend up to six years in prison; 11) May's elderly mother would be subpoenaed and could also be sent to prison; 12) Marshall hoped to have a tax trial against May by March 1993; and 13) Marshall was confident that May would be indicted by a grand jury. (B-6).

On April 22, 1994, the United States filed a motion for summary judgment. On May 23, 1994, May filed a cross-motion for summary judgment and his response in opposition to United States' summary judgment motion. On the same day, May moved the Court, pursuant to Rule 56(f) of the Fed.R.Civ.P., to extend time to obtain essential discovery to supplement his response in opposition to United States summary judgment motion. Numerous pleadings were filed by both parties fully arguing the summary judgment and discovery motions.

On January 18, 1995, the District Court filed an Order effectively denying May any discovery. On October 5, 1995, the District Court filed an Order granting judgment in favor of United States as to disclosures challenged in this Petition, but granting judgment in favor of May as to oral disclosures made to May's brother and mother.[2] (Appendix B). The Court held that May was not entitled to damages for the disclosures of return information in the Special Agents' circular letters that:-(a) May was the subject of an official investigation, (b) disclosed May's

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[2] Jack May and Eula Holmes.

home address, and (c) that the IRS was investigating May for his tax liability for the tax periods 1985 through 1989. The Order granted the United States judgment on the disclosures of return information in the circular letters that (d) the nature of the investigation was criminal by including "Criminal Investigation Division," and (e) in any written or oral communications, including letters, in person conversations, or telephonic conversations that May was under criminal investigation. The Order further granted judgment in favor of United States on any and all other oral disclosures of return information made by government agents, either in person or telephonically, during its investigation of May, except those made to May's brother and mother.

On October 20, 1995, United States filed a motion to alter, amend, or vacate the grant of summary judgment in favor of May on the unauthorized disclosures to his brother and mother. The Court vacated its grant of summary judgment in favor of May on January 8, 1996. On November 20, 1995, May filed a motion in an attempt to clarify the issues submitted by the Court for trial, and the same date he filed a motion for an order authorizing the completion of discovery. On November 30, 1995, the United States filed its suggestions to limit May's discovery, and its response to May's motion to clarify discovery. On April 3, 1996, a Minute Entry was made that denied May's motion to clarify the issues set for trial, denying May's motion for an order authorizing the completion of discovery, except to the extent it directly pertained to the oral disclosures made by Special Agent

Marshall.

Prior to the trial on the oral disclosures made to May's brother and mother, May's mother passed away on November 22, 1996. May then contacted counsel for the United States to enter a stipulated judgment dismissing these disclosures from the litigation. The Stipulated Order For Entry of Judgment was entered on January 22, 1997, and Judgment was entered the same date.

May timely appealed to the United States Court of Appeals for the Eighth Circuit. On February 23, 1998, the Court of Appeals affirmed. (Appendix A). The Court of Appeals held the disclosures that May was under criminal investigation (by using the "Criminal Investigation Division" identifier in the signature block of the circular letters, and as the return address on the envelopes) was impermissible, but done in good faith in accordance to an IRS manual. They also held that the use of the modifier "official" before investigation in the circular letters did not defeat the good faith defense. Finally, as it relates to this petition, they held that the disclosure of May's home address could have objectively been done in good faith.

On April 24, 1998, the Court of Appeals denied May's timely filed petition for rehearing with suggestion for rehearing ***en banc***. (Appendix C).

May timely files this Petitioner for Writ of Certiorari with this honorable Court.

REASONS FOR GRANTING THE WRIT

Joseph A. May filed this action seeking damages under 26 U.S.C. § 7431 for unauthorized disclosure of his taxpayer "return information" in violation of 26 U.S.C. § 6103. May alleged that IRS Special Agents improperly disclosed 1) the fact that he was under criminal investigation, 2) "official" investigation, 3) for his "tax liability" for specified years, 4) his home address, and 5) other non-tax related matters both orally and in circular letters sent to approximately 2,000 of his patients and professional associates.

The United States maintained that the disclosures were authorized under § 6103(k)(6) as disclosures necessary to obtain information not otherwise available, and that any unauthorized disclosures resulted from a good faith, but erroneous, interpretation of § 6103.

The district court held that the disclosures were not actionable under § 7431 because they were either authorized under § 6103(k)(6) or were the result of a good faith, but erroneous, interpretation of § 6103.

The Court of Appeals held the disclosures that May was under criminal investigation (by using the "Criminal Investigation Division" identifier in the signature block of the circular letters, and as the return address on the envelopes) was impermissible, but done in good faith in accordance to an IRS manual. They also held that the use

of the modifier "official" before investigation in the circular letters did not defeat the good faith defense. Finally, as it relates to this Petition, they held that the disclosure of May's home address could have objectively been done in good faith.

The Court of Appeals relied on *Diamond v. United States*, 944 F.2d 431 (8th Cir. 1991) (use of Criminal Investigation Division identifier is an unauthorized disclosure, but done in good faith; objective standard of good faith applicable); and *Jones v. United States*, 97 F.3d 1121 (8th Cir. 1996) (objective standard of good faith) in reaching its decision. May suggests that the facts that: 1) every court to examine the question has held such disclosures to be unauthorized, and 2) numerous courts so held after the disclosures at issue in *Diamond* and before the disclosures herein, sufficiently distinguishes *Diamond's* good faith determination so that it is not controlling here. Furthermore, even under *Diamond's* analysis, the IRS's conduct was not in good faith.

Because the good faith exception limits May's right to recover damages for admittedly unlawful conduct of the United States, and this Court has not decided the bounds of the good faith exception, this Court should issue a writ of certiorari to settle this question.

Furthermore, the Court of Appeals' decision conflicts with other federal court decisions holding that the good faith exception is inapplicable where the United States fails to explain who, if anyone, made any interpretation of §

6103, or what the erroneous interpretation might have been. This Court should issue a writ of certiorari to settle this split in authority.

ARGUMENT

As noted above, this petition deals primarily with the disclosures in circular letters that the "Internal Revenue Service is conducting an official investigation of the tax liability of Joseph A. May, DDS, Route 1, Box 16, Cleveland Missouri for the years 1985, 1986, 1987, 1988 and 1989," with the fact that the signature block and the return address on the envelope both had the identifier "Criminal Investigation Division," and that May's home address was disclosed. The Court of Appeals held that these disclosures were unauthorized. They denied May statutory damages, however, holding these impermissible disclosures where done in "a good faith, but erroneous, interpretation of section 6103."

The seminal case in the Eighth Circuit discussing the good faith exception is *Diamond v. United States*, 944 F.2d 431 (8th Cir. 1991). Discussing this provision, *Diamond* holds that with few exceptions it is the IRS' interpretation of the law, not the individual agent's actions, which is determinative.

> Because section 7431 authorizes causes of actions against the government for violation of section 6103, the good faith exception in section 7431(b) applies to the IRS' interpretation of section 6103,

> not to [the agent's] compliance with the IRS' interpretation of that section. This is particularly true here, because . . . [the agent's] actions accorded with the specific instruction contained in the IRS Handbook for Special Agents.

Diamond, 944 F.2d at 435.

The court noted, however, that this position is contrary to that held in *Husby v. United States*, 672 F.Supp. 442, 445 (N.D. Cal. 1987) ("the IRS cannot collectively qualify as having made a good faith but erroneous interpretation of § 6103"). *Diamond*, 944 F.2d at 435 n.7.

The court also noted that when IRS guidelines comply with section 6103 and its regulations, but the agent misinterprets the guidelines and the statutory and regulatory law, the conduct of the agent will be determinative. *Diamond*, 944 F.2d at 435 n.7; *see also*, *Jones v. United States*, 97 F.3d 1121, 1124, n.7 (8th Cir. 1996).

Most courts have used an objective standard for ascertaining whether § 6103 was violated in good faith. *Diamond*, 944 F.2d at 435; *Huckaby v. U.S. Dept. of Treasury*, 794 F.2d 1041, 1048 (5th Cir. 1986). This standard shields government agents "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Diamond*, 944 F.2d at 435.

May suggests the decision of the Court of Appeals violates both 1) the methodology of federal court decisions from within the Ninth and Seventh Circuits; and 2) the rationale of *Diamond*, in the following particulars.

I. THE IMPERMISSIBLE DISCLOSURE TO OVER 2000 PEOPLE OF MAY'S HOME ADDRESS CANNOT MEET THE GOOD FAITH EXCEPTION OF 26 U.S.C. § 7431(b), BECAUSE NO "MISINTERPRETATION" HAS BEEN SUGGESTED BY THE UNITED STATES AND BECAUSE THE DISCLOSURE WAS OBJECTIVELY UNREASONABLE

A. No Misinterpretation

Marshall and Reitter's circular letters disclosed May's home address. The United States offered no explanation as to why the inclusion of May's home address was necessary. The trial court held the disclosure was authorized because "the information could assist with taxpayer identification." (B-16). It also held that even if unauthorized, "the regulation defining 'mailing address' is a good faith interpretation of § 6103.[3] *Id.* The Court of Appeals addressed the question in two sentences:

> [W]e believe Marshall acted in good faith when he disclosed May's home address. Given the level of

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[3] Whatever that means.

> secrecy with which May conducted his financial affairs, Marshall could well have concluded that it was necessary to mention May's home address to identify him to all of his patients. (A-6).

In *Husby*, the court held the good faith exception "not available" in similar circumstances saying:

> [Section] 7431(b) does not create a general good faith defense; on its face it applies only to good faith misinterpretations of § 6103. Defendant fails to explain who, if anyone, made any interpretation of that statute, or what the erroneous interpretation might have been.

Husby, 672 F.Supp at 445. *See also*, *William E. Schrambling Accounting Corp. v. United States*, 689 F.Supp. 1001, 1007-08 (N.D. Cal. 1988) (good faith exception does not apply to "honest mistakes" where officer "was not acting under a misinterpretation of section 6103"); *Smith v. United States*, 703 F.Supp. 1344 (C.D. Ill. 1989), *rev'd on other grounds*, *964 F.2d 630 (7th Cir. 1992), cert. denied*, 506 U.S. 1067 (1993) (good faith exception inapplicable where "[t]here was no 'interpretation' involved").

Because the United States made no explanation of any need to disclose May's address, the good faith exception does not apply. Therefore, the trial court's and Eighth Circuit's decisions to the contrary are in error.

B. Objectively Unreasonable

Further, the Court of Appeals decision cannot withstand its own analysis in *Diamond*, and it is in clear conflict with that Eighth Circuit precedent. Marshall and Reitter violated May's clearly established statutory right not to have his address disclosed. There is no evidence or even argument by the Government in the record to demonstrate it was necessary to disclose the address. Under the facts of this case, it was objectively unreasonable to disclose May's home address. Marshall's other acts of bad faith are probative.

1. Good faith objectively unreasonable.

It is undisputed that May's home address was unpublished, and he never provided it out to his patients. Neither is it reasonable to expect that doctors provide their home address to patients as part of the doctor-patient relationship. It is less likely that May's patients would know his home address, because he is a specialist that only treats patients by referral on a one time basis for root canals. Indeed, the very secrecy noted by the Court of Appeals proves that it would be even less likely that May would give his address to his patients. Further, Marshall and Reitter did not disclose May's home address on any of the summonses they issued. Neither did Williams disclose the address on her circular letters issued during the civil audit of May. There is simply no basis for finding a good faith misunderstanding of § 6103 in the record for these unauthorized disclosures.

2. Court of Appeals used improper standard.

The Court of Appeals used the objective standard announced in *Diamond* to affirm, based on its own theoretical basis of good faith; i.e, the panel held "Marshall **could well have** concluded" with no evidence that he did so. This is impermissible for at least two reasons.

First, it renders nugatory the Eight Circuit's pronouncement that the "burden of pleading and proving good faith under section 7431 rests with the government." *Jones*, 97 F.3d at 1124. If all federal courts can rule based on any theoretical basis, the government has no burden at all.

Second, it renders the requirement that the disclosure be "necessary" meaningless. In this case, the record indicates that it is unlikely that May's home address would be known to his patients. Yet, this unlikely knowledge is the basis for finding the unauthorized disclosure to have been done in good faith. How much more would a theoretical basis about which the record is neutral be considered sufficient?

3. Bad faith proven.

Although the death of May's mother prompted him to dismiss his claims related to certain oral disclosures by Marshall, the evidence in the record is probative of Marshall's intent. Marshall's knowledge that he destroyed May's business via his circular letters indicates that he had

such a purpose or could have anticipated such a result. It is reasonable to expect such a result and to require the agent to use the highest level of tact in his conduct. Marshall's threatening of witnesses, disclosures of information totally unrelated to a tax investigation, and other unauthorized disclosures demonstrate a course of conduct that can only be described as in bad faith.

It is simply incredible that the disclosure by the IRS that May allegedly fathered a child out of wedlock is not, by itself, enough to conclusively demonstrate that the IRS acted in bad faith. Considering the utter lack of any basis to disclose May's home address, the totality of the IRS' conduct is forceful evidence against a good faith misinterpretation of the law.[4]

Because the disclosure of May's home address was not necessary, and it cannot be objectively viewed as a good faith misinterpretation of 26 U.S.C. § 6103, the Court of Appeals opinion is contrary to all Court of Appeals' decisions interpreting the good faith exception, including the Eighth Circuit's own precedent.

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[4] If the same level of proof were used to measure that misinterpretation of law sufficient to overcome willfulness in tax crime prosecutions, the United States would never obtain a conviction.

II. THE IMPERMISSIBLE DISCLOSURE THAT MAY WAS UNDER CRIMINAL INVESTIGATION CANNOT MEET THE GOOD FAITH EXCEPTION OF 26 U.S.C. § 7431(b), BECAUSE THE IRS HAD NOTICE THAT THE DISCLOSURES WERE IMPERMISSIBLE

Marshall and Reitter's circular letters contained the identifier "Criminal Investigation Division" in the signature block and on the return address of envelopes. The Eighth Circuit held this impermissible in *Diamond*, yet determined that the IRS acted in good faith. Because Marshall followed the IRS Manual by including the identifier, the Court of Appeals chose to evaluate the good faith of the IRS. (A-5). They determined that since *Diamond* was not published until after the circular letters were sent, and the petition for rehearing denied, the IRS acted with the same good faith as they did in *Diamond*. *Id.* They rejected May's argument that the district court's unpublished decision in *Diamond* "put the IRS on notice that the CID identifier violated section 6103." *Id.* The Court of Appeals did not address the other cases cited in May's appellate briefs which gave the IRS notice before the disclosures at issue herein.

Diamond requires a good faith misinterpretation of §6103 on the part of the IRS before this agency can avoid liability for its unauthorized disclosures. By ignoring numerous adverse rulings by federal courts against the IRS after the disclosures in circular letters at issue in the

Diamond district court case, and before the instant unauthorized circular letter disclosures, the Court of Appeals improperly applied *Diamond*, and reached a result contrary to the statute and appellate authorities.

The 201 circular letters in *Diamond* were issued during 1985, *Diamond*, 944 F.2d at 432; the 2000 instant letters six years later. The IRS was put on notice by the following cases after the *Diamond* circular letters, but before the instant letters, that disclosing the nature of an investigation as criminal was not necessary and unauthorized:

> *United States v. Texas Heart Institute*, 755 F.2d 469, 482 (5th Cir. 1985) (the disclosure by the IRS to Barrett's patients that he was under criminal investigation by Criminal Investigation Division might be an unauthorized disclosure of return information prohibited by section 6103; remanded for determination).
>
> *Barrett v. United States*, 795 F.2d 446, 448 & 451 (5th Cir. 1985) (a genuine issue of material fact has been raised as to whether disclosure of the return information that the taxpayer was under investigation, particularly criminal investigation, by the Criminal Investigation Division was necessary).
>
> *United States v. Barrett*, 804 F.2d 1376, 1379 (5th Cir. 1986) (***en banc***) (mandate in *Texas Heart* requires the district court to consider whether enforcement of an IRS summons should be

> conditional in order to protect Barrett against unnecessary disclosure of the fact that he is under criminal investigation by Criminal Investigation Division).
>
> *Malis v. United States*, 87-1 U.S.T.C. 87,348, 15 (C.D. Cal. 1986) (even the implication that a taxpayer is under investigation constitutes return information).
>
> *Heller v. Plave*, 657 F.Supp. 95, 98-99 (S.D. Fla. 1987) (letters stating that agent was in the Criminal Investigation Division and conducting a criminal tax investigation of taxpayer "were unnecessary and improper" and "**depict a lack of integrity on the part of the government**").

Additionally, the Court of Appeals should have considered *Diamond v. United States*, 1989 U.S. Dist. LEXIS 9726 (S.D. Iowa July 24, 1989) to have been sufficient notice. The fact that the decision was unpublished is irrelevant. Since the disposition of this issue rests with the IRS' knowledge, not Marshall's, the IRS had actual notice of the district court's decision in *Diamond* because United States was a party. The IRS was also a party in each and every case listed above.

The IRS had actual notice that its conduct was impermissible from courts in four federal circuits, including the Eighth Circuit, yet continued their abysmal rejection of these uniform judicial pronouncements. The

IRS' conduct is made more onerous by the fact that the statutory provision involved is one meant to protect the privacy of citizens by proscribing IRS conduct. Good faith of this agency requires it to lead the cause of limiting unnecessary disclosures of return information; not continue claiming a good faith interpretation until a federal appellate court publishes a decision specifically proscribing the exact disclosure complained of herein. The IRS' conduct was not in good faith.

III. THE DISCLOSURE THAT MAY WAS UNDER OFFICIAL INVESTIGATION WAS IMPERMISSIBLE AND NOT DONE IN GOOD FAITH BECAUSE IT WAS UNNECESSARY AND DEVIATED FROM THE LANGUAGE SUGGESTED BY THE IRS WITHOUT EXPLANATION

Marshall's and Reitter's circular letters stated the IRS "is conducting an official investigation of the tax liability of" May. As noted above, the Handbook for Special Agents suggests the following wording: "is conducting an investigation of". The United States offered no explanation as to why the word "official" was added. The trial court held, in seeming contradiction, that 1) it "could well cause some addressees to respond who otherwise would not," and 2) "it was obvious there was an 'investigation' from the content of the letter. Putting official in front of it adds nothing that was not already obvious." (B-14). The trial court noted that *Diamond* might indicate otherwise. *Id.* It also held that even if

unauthorized, it "resulted from a good faith interpretation of § 6103." *Id.* The Court of Appeals stated that "Marshall's **deviation** from the suggested wording" "**followed**" the suggested wording and held that it was done in good faith. (A-5).

Since the Handbook language is in accord with the Law and Regulations, analysis of Marshall's and Reitter's good faith is appropriate. There was no explanation as to why they "deviated" from the suggested wording. It was obviously not necessary to add the word "official." Marshall and Reitter "can be expected to know statutory provisions governing disclosure, as interpreted and reflected in IRS regulations and manuals." *Jones*, 97 F.3d at 1125. Their "failure to consult [use] the statutory language as interpreted and reflected in IRS regulations and manuals prior to an improper disclosure of return information is strong evidence that the interpretation of the statute was not in good faith." *Jones*, 97 F.3d at 1125. Here, there was no evidence whatsoever of good faith.

CONCLUSION

The Court of Appeals applied the statutory good faith misunderstanding exception to prevent May's recovery of statutory damages for impermissible disclosures without even requiring the United States to offer an explanation as to why impermissible disclosures were made. This is contrary to several federal court decisions and the resulting split of authority presents a question not settled by this Court.

Furthermore, the Court of Appeals applied *Diamond* in a manner to reach a result contrary to the rationale of *Diamond* and other federal appellate cases that a good faith misinterpretation be objectively reasonable.

For these compelling reasons, this Court should grant May's petition and issue a writ of certiorari to review and reverse the decision of the Eighth Circuit.

Respectfully submitted,

Joseph A. May
1312 Southwest Boulevard
Jefferson City, MO 65109
(314) 634-4455

APPENDIX A

Joseph A. May, Appellant, v. United States of America, Appellee.

No. 97-1694

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

1998 U.S. App. LEXIS 2833;
98-1 U.S. Tax Cas. (CCH) ¶ 50,220;
81 A.F.T.R.2d 853

February 23, 1998, Filed

NOTICE: RULES OF THE EIGHTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Western District of Missouri.

DISPOSITION: Affirmed.

COUNSEL: JOSEPH A. MAY, Plaintiff - Appellant, Pro se, Jefferson City, MO. For UNITED STATES OF AMERICA, Defendant - Appellee: Gay L. Tedder, SHOOK & HARDY, Kansas City, MO. Judith Marie Strong, U.S. ATTORNEY'S OFFICE, Kansas City, MO.

Jonathan S. Cohen, Murray S. Horwitz, Pamela C. Berry, U.S. DEPARTMENT OF JUSTICE, Washington, DC. R. Scott Clarke, U.S. DEPARTMENT OF JUSTICE, Washington, DC.

JUDGES: Before McMILLIAN, LOKEN, and MURPHY, Circuit Judges.

OPINION: PER CURIAM.

Joseph A. May appeals from the district court's n1 adverse grant of summary judgment in his suit against the government for disclosures made to third parties during the course of an investigation of him for possible criminal tax violations. We affirm.

> n1 The HONORABLE GARY A. FENNER, United States District Judge for the Western District of Missouri, entered final judgment; the order granting summary judgment and other rulings challenged by May were made by the HONORABLE D. BROOK BARTLETT, Chief Judge, United States District Court for the Western District of Missouri.

May, an endodontist, failed to file tax returns for a number of years. Ultimately, the Internal Revenue Service (IRS) commenced a criminal investigation of May, who did not maintain bank accounts and had refused to allow examination of his books and records. As part of this investigation, Gary A. Marshall and another IRS special

agent with the Criminal Investigation Division (CID) sent approximately 2,000 "circular letters" to May's patients between January and July 1991. The opening sentence of the letter stated: "The Internal Revenue Service is conducting an official investigation of the tax liability of Joseph A. May, DDS, Route 1, Box 16, Cleveland, Missouri for the years 1985, 1986, 1987, 1988 and 1989." The letter sought assistance in determining amounts paid to May between 1985 and 1989 for dental services. Appearing below the agent's name in the signature block were the words "Special Agent" and "Criminal Investigation Division."

Marshall prepared the letter in accordance with an IRS manual, which in section 347.2 instructed special agents to include their title and "Criminal Investigation Division" in the signature block. Section 347.2 restricted reference to CID to the signature blocks or ancillary headings, and prohibited disclosure in the body of the letter that the taxpayer was under investigation by CID, suggesting as an example of appropriate wording that the IRS was conducting an investigation of the person in question.

In July 1991 May initiated this lawsuit, alleging violations of 26 U.S.C. § 6103, which prohibits the unlawful disclosure of "return information." n2 See 26 U.S.C. § 7431(a) (authorizing damages action against United States based on knowing or negligent disclosure of return information in violation of § 6103). May maintained that the following circular-letter material violated section 6103: the CID identifier in the signature block of the letter,

the phrase "official investigation," May's home address, and identification of the tax years under investigation. The court concluded that the disclosures were authorized under 26 U.S.C. § 6103(k)(6) (permitting disclosure of return information when necessary to obtain information "not otherwise reasonably available, with respect to the correct determination of tax") and the statute's derivative regulation, Treas. Reg. 301.6103(k)(6)-1(a) (1997); or did not give rise to liability based on 26 U.S.C. § 7431(b), which provides liability will not arise as to any disclosure resulting "from a good faith, but erroneous, interpretation of section 6103."

n2 Return information is defined as

> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine . . . .

26 U.S.C. § 6103(b)(2).

We review the district court's judgment de novo, considering the evidence in the light most favorable to May. See *Diamond v. United States*, 944 F.2d 431, 433 (8th Cir. 1991). After such review of the record, we agree with the district court that the government is entitled to section 7431(b)'s good-faith defense against liability for the CID identifier in the signature block of the circular letters. *See id.* at *436* (although IRS erroneously interpreted § 1603 [sic] when it instructed special agents to include CID identifier in signature block of circular letters, it did so in good faith thus triggering application of § 7431(b)). Diamond was not issued until after the circular letters were mailed here, and we reject May's suggestion that the trial court's unpublished decision in *Diamond v. United States*, 1989 U.S. Dist. LEXIS 9726 (S. D. Iowa July 24, 1989) (unpublished ruling) put the IRS on notice that the CID identifier violated section 6103.

Likewise, we believe the government was entitled to the good-faith defense against liability for disclosing that May was the subject of an "official investigation." Marshall followed wording suggested in section 347.2 of the IRS manual, and we believe this suggested language resulted from a good faith interpretation of section 6103 at that time. Cf. *Diamond*, 944 F.2d at 434, 435-37 (instruction in § 347.2 concerning CID identifier resulted from good faith misinterpretation of § 6103, given that elsewhere in manual IRS warned against committing unnecessary disclosures and emphasized potential of circular letters to cause unwarranted embarrassment to

taxpayer and other damaging collateral consequences). Moreover, we are not persuaded that Marshall's deviation from the suggested wording--use of the word "official" before "investigation"--defeats the good-faith defense.

As to the remaining circular-letter disclosures, we agree with the district court that it was necessary to identify the years for which the IRS was requesting information, and we believe Marshall acted in good faith when he disclosed May's home address. Given the level of secrecy with which May conducted his financial affairs, Marshall could well have concluded that it was necessary to mention May's home address to identify him to all of his patients. See *Jones v. United States*, 97 F.3d 1121, 1125 (8th Cir. 1996); *Diamond*, 944 F.2d at 435 (both describing objective standard of good faith).

May also complained below about various disclosures the special agents allegedly made during personal visits with third persons, and about the agents' alleged use of threats and other abusive tactics in obtaining information. Like the district court, we conclude that the alleged threats do not implicate section 6103. We also conclude that the remaining disclosures--including those May maintains the district court failed specifically to address--either do not involve return information, were authorized under section 6103(k)(6) and the related regulation, or resulted from a good faith interpretation of section 6103.

Finally, we disagree with May that the district court abused its discretion in granting summary judgment

without permitting him to conduct additional discovery, because we do not believe he sufficiently identified specific facts he needed to discover to resist the motion. *See* Fed. R. Civ. P. 56(f); *Dulany v. Carnahan*, 132 F.3d 1234, 1997 U.S. App. LEXIS 36405, *10 (8th Cir. 1997).

Accordingly, we affirm.

APPENDIX B

JOSEPH A. MAY and GLENDA S. MAY, Plaintiffs,
v. UNITED STATES OF AMERICA, Defendant.

No. 91-0650-CV-W-9

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

1995 U.S. Dist. LEXIS 16204;
95-2 U.S. Tax Cas. (CCH) ¶ 50,605;
76 A.F.T.R.2d (P-H) 7222

October 5, 1995, FILED

COUNSEL: Joseph A May, plaintiff, [PRO SE], Jefferson City, MO. Glenda S Scoville, plaintiff, [PRO SE], Cleveland, MO. For USA, defendant: Judith M. Strong, Gay L. Tedder, U.S. Attorney's Office, Kansas City, MO. Alleen S. Castellani, U.S. Attorney's Office, Kansas City, MO. R. Scott Clarke, U.S. Department of Justice, Trial Attorney, Tax Division, Washington, DC. Josh Eagle, U. S. Department of Justice, Tax Division, Washington, DC.

JUDGES: D. BROOK BARTLETT, UNITED STATES DISTRICT JUDGE

OPINIONBY: D. BROOK BARTLETT

OPINION: ORDER GRANTING IN PART

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Joseph A. May and Glenda S. May in their Second Amended Complaint, filed on May 12, 1992, seek statutory and actual damages for alleged disclosures of tax return information under 26 U.S.C. §§ 6103 and 7431.

When referring to plaintiffs, I do so by using the singular "plaintiff." I do not understand why Glenda May is a plaintiff in this lawsuit. Consequently, I will issue simultaneously with this order an Order to Show Cause Why Glenda May's Cause of Action Should Not be Dismissed. If Glenda May satisfies me that she has a joint claim with Joseph May, I will issue an order amending this order to refer to plaintiffs rather than plaintiff.

Defendants and plaintiff have filed cross-Motions for Summary Judgment.

I. Undisputed Facts

Dr. Joseph May (May) is a dentist who between 1985 and 1988 specialized in endodontics at offices in Kansas City, Missouri, and Jefferson City, Missouri.

As of May 31, 1989, May had not filed tax returns for

the tax years 1985 through 1988. In 1989, Internal Revenue Service Agent Janice L. Williams began an audit of May to determine May's federal tax liability, if any, for the years 1985 through 1988. Williams learned from her supervisor and other people who had worked on the May case that May had refused to cooperate with the Internal Revenue Service (IRS). For example, May had previously refused to turn over records to the IRS, claiming that he was not a person obligated to pay federal taxes. Williams Aff. ¶ 7.

In order to determine May's tax liability, Williams determined that she needed to know the amount of May's income. May had no known bank accounts. Accordingly, it was impossible for Williams to reconstruct May's income by simply reviewing bank records. Williams Aff. ¶ 10. Therefore, Williams decided to contact third parties, such as patients, who may have paid May during the relevant years. Williams Aff. ¶ 6.

William knew that, as a specialist, May obtained virtually all of his patients through referrals from local dentists. Williams believed that if she contacted these local dentists, they could provide her with the names of patients who they had referred to May. Williams Aff. ¶ 9. If she obtained these patient lists, Williams could then contact the patients to determine whether they made payments to May and, if so, the amount paid. Williams Aff. ¶ 11.

To determine which dentists may have referred patients to May, Williams decided to initiate a circular

letter campaign. In a "circular letter" campaign, the IRS sends letters to people who they believe may have paid money to the taxpayer under investigation. The letters request information about the taxpayer from the addressee. The IRS uses the circular letter approach instead of in-person interviewing when it needs to obtain information from a large number of people.

Williams decided to contact the dentists by circular letter rather than in person because 1) the government would save time and money; 2) it would be difficult to arrange mutually convenient times to interview a large number of people; and 3) sending letters would allow the recipients to gather the requested information at their own convenience. Williams Aff. ¶ 15.

Before mailing the circular letters to local dentists, Williams sought supervisory approval. Williams Aff. ¶¶ 17-18. Williams supervisor Vicki Pein approved the use of circular letters. Williams Aff. ¶¶ 17-18.

Between May 1989 and February 1990, Williams mailed letters to local dentists who might have referred patients to May. Williams Aff. ¶ 12. The letters requested "the names, addresses and phone numbers of patients referred to Dr. Joseph A. May in the period between January 1, 1985, through December 31, 1988." Williams Aff., Exhibit A.

As expected, numerous dentists responded to these letters. From these responses, Williams compiled a list of

patients who had been referred to May. Williams decided to mail letters to the patients requesting information about May. These letters requested "any information regarding services provided to you by Dr. Joseph May including, but not limited to, copies of billing statements, insurance reimbursement, cancelled [sic] checks and the dates of treatment." Williams Aff., Exhibit B. Williams' supervisor, Vicki Pein, approved of the letter. Williams Aff. ¶ 18. Between August 1989 and February 1990, Williams mailed the letters.

In August 1990, the IRS' Examination Division referred May's case to the Criminal Investigation Division. The case was assigned Special Agents Keir Reiter and Gary Marshall. Marshall Aff. ¶ 2. Upon reviewing the file, Marshall discovered that 1) May had not filed a tax return since 1978; 2) May received 98% of his patients through referrals; 3) May had no known bank accounts; 4) May paid his expenses by cashier's checks, cash, or money orders; and 5) May had failed to provide to the Examination Division any records relating to his income or expenses for the years 1985 through 1988.

Like Williams, Marshall believed that he could not reconstruct May's income without procuring information from local dentists and May's patients. Marshall decided the best way to obtain this information was to follow up on Williams' circular letter campaign and send out more letters. Marshall Aff. ¶ 9.

Between December 1990 and January 1991, Special

Agents Marshall and Reiter contacted many of the dentists identified by the Examination Division as having referred patients to May. Like Williams had done earlier, Marshall and Reiter asked these dentists for a list of patients they had referred to May. Marshall Aff. ¶ 8.

Having obtained a list of patients who had been referred to May, Marshall prepared a circular letter to be sent to these patients. In drafting this letter, Marshall took care to draft the letter in accordance with the Special Agents Handbook. In accordance with the Handbook, § 347.2, Marshall limited his reference to the criminal Investigation Division to the letters' signature blocks or ancillary headings. The postage-paid return envelopes also made reference to the criminal Investigation Division. Marshall's Group Manager, the Acting Chief of the Saint Louis criminal Investigation Division, approved the mailing of this circular letter. In these letters, Marshall disclosed May's name and the fact that there was an ongoing investigation. Marshall Aff. ¶ 9. The IRS mailed approximately 2,000 of these letters between January 1991 through July 1991. Marshall Aff. ¶¶ 6, 16. Marshall sent the letters to May's patients in order to assist him in his criminal investigation of May.

In addition to sending the circular letter, Marshall conducted some personal interviews[.] In April 1992, Agent Marshall visited Eula Holmes in North Little Rock, Arkansas. According to Holmes' affidavit, Marshall disclosed that May was in "trouble" with "tax crimes;" that the IRS had "gathered up a lot of evidence against [May];

[and that May] would be looking at 2 counts of felonies and several misdemeanor charges [adding up to] 6 years in prison." Eula Holmes Affidavit.

Also in April 1992 and also in North Little Rock, Arkansas, Agent Marshall visited Jack May. According to Jack May's affidavit, Marshall stated that "Dr. May was under criminal investigation, and he was in trouble with taxes, and [that] they hoped to have a trial [in March 1993]." Marshall continued to say that May "was looking at two felony and several misdemeanor charges" and that he "could get up to 6 years in jail." Marshall said that he felt confident that [May] would be indicted by the Grand Jury. Jack May Affidavit.

In January 1994, May pled guilty to criminal violations of the Internal Revenue Code. The information Marshall collected proved important in this prosecution. Marshall Aff. ¶ 20.

II. Standard for Summary Judgment

Rule 56(c), Federal Rules of Civil Procedure, provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit

of all reasonable inferences to be drawn from the evidence. *Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); Inland Oil and Transport Co. v. United States*, 600 F.2d 725, 727-28 (8th Cir.), *cert. denied*, 444 U.S. 991, 62 L. Ed. 2d 420, 100 S. Ct. 522 (1979).

If there is no genuine issue about any material fact, summary judgment is proper because it avoids needless and costly litigation and promotes judicial efficiency. *Roberts v. Browning*, 610 F.2d 528, 531 (8th Cir. 1979); *United States v. Porter*, 581 F.2d 698, 703 (8th Cir. 1978). The summary judgment procedure is not a "disfavored procedural shortcut." Rather, it is "an integral part of the Federal Rules as a whole." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1966); see also *City of Mt. Pleasant v. Associated Electric Cooperative, Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). Summary judgment is appropriate against a party who fails to make a showing sufficient to establish that there is a genuine issue for trial about an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex, 106 S. Ct. at 2553.*

The moving party bears the initial burden of demonstrating by reference to portions of pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, the absence of genuine issues of material fact. However, the moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.*

(emphasis added).

The nonmoving party is then required to go beyond the pleadings and by affidavits, depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* A party opposing a properly supported motion for summary judgment cannot simply rest on allegations and denials in his pleading to get to a jury without any significant probative evidence tending to support the complaint. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The evidence favoring the nonmoving party must be more than "merely colorable." 106 S. Ct. at 2511. When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (footnote omitted).

The inquiry to be made mirrors the standard for a directed verdict: whether the evidence presented by the party with the onus of proof is sufficient that a jury could properly proceed to return a verdict for that party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505 at 2511, 91 L. Ed. 2d 202. Essentially, the question in ruling on a motion for summary judgment and on a motion

for directed verdict is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. 106 S. Ct. at 2512.

III. Discussion

A. Applicable Law

May contends that IRS agents illegally disclosed confidential tax information about him to members of the public. Relying on 26 U.S.C. § 7431(a)(1), which allows a taxpayer to sue for damages caused by the unauthorized disclosure of taxpayer information by the federal government, May argues that IRS agents violated the confidentiality of his tax records as protected by 26 U.S.C. § 6103(a).

Section 6103(a) states in relevant part:

> Returns and return information shall be confidential, and except as authorized by this title . . . no officer or employee of the United States . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

Subsection (b) of § 6103 defines "return and return

information", in part, as "a taxpayer's identity, . . . whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing. . . ." 26 U.S.C. § 6103(b)(2)(A).

Section 6103(b)(8) defines "disclosure" as "the making known to any person in any manner whatsoever a return or return information." 26 U.S.C. § 6103(b)(8).

The prohibition on disclosure is subject to exceptions. Specifically, § 6103(k)(6) authorizes the disclosure of return information by internal revenue officers and employees for investigative purposes:

> to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary [of the Treasury] may prescribe by regulation.

26 C.F.R. 301.6103(k)(6)-1(a) provides:

> In connection with the performance of official duties relating to any examination, collection activity, civil or criminal

investigation, enforcement activity, or other offense under the internal revenue laws . . . an officer or employee of the Internal Revenue Service . . . is authorized to disclose taxpayer identity information (as defined in § 6103(b)(6)), the fact that the inquiry pertains to the performance of official duties, and the nature of the official duties in order to obtain necessary information relating to the performance of such official duties or where necessary in order to properly accomplish any activity described in subparagraph (6) of paragraph (b) of this section. Disclosure of taxpayer identity information to a person other than the taxpayer to whom such taxpayer identity information relates or such taxpayer's legal representative for the purpose of obtaining such necessary information or otherwise properly accomplishing such activities as authorized by this paragraph should be made, however, only if the necessary information cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained in accurate and sufficiently probative form, or in a timely manner, and without impairing the proper performance of the official duties, or if such activities cannot otherwise properly be accomplished without making such disclosure.

Taxpayers have a civil remedy in the event of an unauthorized disclosure of return or return

> If any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information with respect to a taxpayer in violation of any provision of § 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

26 U.S.C. § 7431(a)(1).

In order for May to prevail on his § 7431 claim, he must establish by a preponderance of the evidence that: 1) the federal government disclosed "return or return information;" 2) the disclosure was unauthorized; and 3) the disclosure was made "knowingly or by reason of negligence."

Additionally, May must overcome the good faith affirmative defense provided by 26 U.S.C. 7431(b). "No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of § 6103." 26 U.S.C. § 7431(b).

B. Application of the Law to the IRS' Audit Letters

Plaintiff asserts that § 6103 was violated by the letters sent by Revenue Agent Williams in the course of her audit

of May's 1985-1988 tax years (audit letters). Plaintiff argues the IRS unlawfully disclosed tax return information when the IRS said in "the hundreds of disclosures in circular letters that 'the Internal Revenue Service is conducting an official investigation of the tax liability of Joseph A. May, DDS, Route 1, Box 16, Cleveland, Missouri for the years 1985, 1986, 1987, 1988 and 1989.'" Plaintiff's Mot. S.J. at 4-5.

1. The Williams Letter

a. Reference in the Letter to May Being "Subject to an Official Investigation"

Plaintiff argues that the IRS violated § 6103 by unnecessarily stating in the audit letter that he was "subject to an official investigation". Defendant argues that § 6103(k)(6) authorized the disclosure. The regulations authorize disclosures "only if the necessary information cannot, under the facts and circumstances of the particular case, otherwise reasonably be obtained." 26 C.F.R. § 301.6103(k)(6)-1 (emphasis added). The United States does not explain why it was necessary to refer to an "official investigation." Saying so could well cause some addressees to respond who otherwise would not. Also, it was obvious there was an "investigation" from the content of the letter. Putting official in front of it adds nothing that was not already obvious. Therefore, on this record, reference to official disclosure did not violate § 6103(a). *But see Diamond v. United States*, 944 F.2d 431, 436 (8th Cir. 1991) (where a statement that plaintiff was under

"criminal investigation" was found to be unnecessary).

Even if disclosure that an "official investigation" was in progress was unnecessary, this disclosure does not give rise to § 7431 liability because the disclosure resulted from a good faith interpretation of § 6103. In *Diamond*, a taxpayer sued the IRS for unlawful disclosures of return information during a criminal investigation of the taxpayer. *Id. at 433. The taxpayer contended that the IRS Agent did* not need to identify himself on the circular letters as a member of the "Criminal Investigation Division." *Id.* Although the Court of Appeals concluded that this disclosure was unnecessary, the Court ruled that the good faith defense provided in § 7431(b) precluded liability. *Id.* at 435-36. The good faith defense applies to the IRS's interpretation of § 6103 not to the agent's compliance with the IRS's interpretation of § 6103. *Id. at 435.* The agent had acted in accordance with the specific instructions in the IRS Handbook for Special Agents which directed agents to mail circular letters with a signature block that read "Special Agent, Criminal Investigation Division." The Court concluded that the direction in the Handbook was a good faith interpretation of § 6103 because the IRS had warned its agents elsewhere in the Handbook against committing unnecessary disclosures. *Id.* at 436-37.

Like the agent in Diamond, Agent Williams "references to official investigation" followed the format for this type of letter in the Internal Revenue Manual. Williams Aff., ¶ 12. Also like the IRS agent in *Diamond*, Williams cleared the letter through her superiors.

Therefore, consistent with *Diamond*, I conclude that the IRS instructed its agents to refer to "official investigation" in good faith. Consequently, the good faith defense in § 7431(b) protects the United States from liability for Williams' reference to "official investigation."

b. The Inclusion of May's Home Address in the Letters

Plaintiff argues that Agent Williams' circular letters violated § 6103 by including his home address. Regulation 301.6103(k)(6)-1(a) authorizes the disclosure of "taxpayer identity" information. Section 6103(b)(6) defines "taxpayer identity" to include the taxpayer's "mailing address." While it is not clear if Regulation 301.6103(k)(6)-1(a) defines "mailing address" to include home addresses, business addresses, or both, the use of May's home address does not give rise to civil liability because the information could assist with taxpayer identity. See *DiAndre v. United* States, 968 F.2d 1049, 1053 (10th Cir. 1992)(holding that taxpayer's business address was necessary under § 6103 because the address was nonsensitive public information).

Again, however, even if revealing May's home address "violates" § 6103(a), the regulation defining "mailing address" is a good faith interpretation of § 6103.

c. Listing of the Specific Tax Years in the Letters

Plaintiff argues that the IRS unnecessarily disclosed that it was investigating him for the tax years of 1985,

1986, 1987, and 1988. I disagree. May's failure to file tax returns required the IRS to reconstruct his income for the years 1985-1989. In its information-seeking letters, the IRS needed to disclose the fact that May was under investigation for those years to focus the addressees on the information they were being requested to furnish. Consequently, I find that revealing the tax years being investigated did not violate § 6103.

2. The Marshall Letters

a. Reference in the Letters to a "Criminal Investigation"

Plaintiff challenges the references in letters sent by Special Agent Marshall that a criminal investigation of May was in progress.

In Diamond, the Eighth Circuit considered the necessity of including the words "Special Agent, criminal Investigation Division" beneath the IRS agent's signature. As in this case, the IRS agent in Diamond sought taxpayer information by sending circular letters to patients of a doctor who was under investigation. The court concluded that it was unnecessary to disclose that the doctor was under "criminal investigation." *Diamond*, 944 F.2d at 436. Thus, the court found the disclosure to be unauthorized under § 6103(k)(6)(1)(a). Nonetheless, the court refused to find the government liable under § 7431 because of the good faith exception in § 7143(b).

Again, the United States does not attempt to explain

why reference to a "criminal investigation" was necessary to obtain information. Although reference to "criminal" might have caused addressees to take the request for information more seriously, the United States does not attempt to justify its use on that ground.

The signature block of the circular letters in *Diamond* was identical to the signature block on the letters sent by Marshall. Marshall Aff. at 6-7. Furthermore, Kraig Bertram, then acting Chief of the Criminal Investigation Division, approved Marshall's letter. Marshall Aff. at 2, 7. Therefore, as in Diamond, the good faith exception in § 7143(b) protects the defendant from liability.

3. Personal Visits and Telephone Calls to Third Parties

a. Oral Disclosures Made to Eula Holmes and Jack May

In support of his Motion for Summary Judgment, plaintiff submits affidavits from Eula D. Holmes and Jack R. May. Holmes and Jack May state that Marshall disclosed tax return information to both of them.

Ms. Holmes says in her affidavit that:

> Mr. Marshall proceeded to tell me how much trouble my son was in with tax crimes, that he had gathered up a lot of evidence against him, and urged me to make him come in and confess to all these crimes. Also, said (sic) my son would be

> looking at two counts of felonies and several misdemeanor charges, up to six years in prison, that if he did not come in and answer the questions they needed to know, that I would be subpoenaed to the trial, and could be sent to prison myself for some of the things in question, if my son did not cooperate. Mr. Marshall seemed to be crusading against my son.

Plaintiff's Exh. K.

Similarly, Jack May swears that:

> Mr. Marshall told me, May was under criminal investigation, and he was in trouble with taxes, and they hoped to have a trial the following March of 1993. He also said, my brother was looking at two felonies and several misdemeanor charges and could get up to 6 years in jail, but, the trial judge had the final word.

Plaintiff's Exh. L.

The United States does not dispute that Marshall said what Holmes and Jack May say he said. See Rule 56(e), Federal Rules of Civil Procedure (setting forth the proper way to create a dispute of material fact). Therefore, on this record, it has been established by plaintiff that Marshall said what Holmes and Jack May say he said.

Marshall's opining about May's tax liability constitutes information regarding "the existence, or possible existence, of liability . . . of any person under this title for any tax, penalty, . . . or offense." 26 U.S.C. § 6103. The United States makes no argument that these statements were necessary to procure pertinent information. Therefore, the statements do not fall within § 6103's necessity exception.

An objective standard is used for ascertaining whether § 6103 was violated in good faith. Diamond, 944 F.2d at 435-36; *see also Huckaby v. United States Dept. of Treasury*, 794 F.2d 1041, 1048-49 (5th Cir. 1986) (courts use an objective standard to evaluate challenged behavior).

In applying this standard, the good faith defense applies to the IRS's interpretation of § 6103, not to the agents' compliance. *Diamond*, 944 F.2d at 435. Here, the IRS has not instructed its agents to make statements of the type attributed to Marshall. Therefore, there is no basis on this record to apply the good faith defense.

However, the standard articulated in Diamond was with reference to an IRS interpretation authorizing the action taken by the agent. Here, where there is no interpretation authorizing even arguably the agent's action, inquiry could be made whether Marshall's actions were objectively reasonable, i.e., would a reasonable IRS agent in Marshall's shoes have believed reasonably that he was authorized to make the disclosures? Because what Marshall said was tax return information as defined in §

6103(b), and because no IRS regulation authorizes the disclosures Marshall made, a reasonable IRS agent in Marshall's shoes could not have believed in good faith that the disclosures were authorized.

As for the third element of § 7431 liability, there is no genuine issue of material fact that Marshall disclosed this information "knowingly or by reason of negligence." The record establishes that Marshall travelled [sic] to Arkansas to interview Eula Holmes and Jack May. The purpose of these interviews was to procure information regarding Dr. May's federal tax returns. Based on these facts, I find that no reasonable juror could conclude that Marshall had said what he said to Holmes and May, but did not do so "knowingly or by reason of negligence."

Defendant wants me to disregard Jack May's and Holmes' affidavits because plaintiff fails to specifically allege these disclosures in their Second Amended Complaint. Defendant argues that "if an allegation giving rise to a cause of action is not included in the pleadings, then it cannot be considered by the court in granting or denying a dispositive motion." Defendant's proposition may be generally correct, but plaintiff's allegations in his Second Amended Complaint satisfy the notice pleading requirements under Rule 8, Federal Rules of Civil Procedure. Plaintiff alleged that IRS agents made numerous oral disclosures. This allegation sufficed to place the defendant on notice that plaintiff is complaining about oral disclosures. Discovery could have revealed the specifics. Consequently, I am not persuaded by defendant's

argument.

Accordingly, on this record, plaintiff has established that Marshall, an IRS agent, made disclosures prohibited by § 6103.

b. Hyler Affidavit

Plaintiff alleges that IRS Special Agents disclosed return information by announcing that they were "special Agents with [the] criminal Investigation Division conducting an official investigation of Dr. May." Jill Hyler Affidavit.

As previously discussed, the good faith defense under § 7431(b) protects IRS agents from liability when they reveal that they are working on an official investigation.

Accordingly, defendant's Motion for Summary Judgment will be granted for disclosures that May was under a criminal investigation.

c. Oral Threats

Plaintiff asserts that IRS agents threatened some of the people solicited in order to persuade them to provide information about May. *See e.g.* Mae Benson affidavit (stating that Marshall threatened affiant by saying that "if [you] have any dealings with May things would most certainly go bad for [you] down the road."). This fact is not relevant to a cause of action brought under § 6103. Section

6103 prohibits disclosure of tax return information. See *Simpson v. United States*, 92-1 U.S. Tax Cas. (CCH) P 50,077, 1991 U.S. Dist. LEXIS 19356 (N.D. Fla. 1991), *aff'd*, 986 F.2d 507 (11th Cir. 1993), *cert. denied*, 509 U.S. 925, 125 L. Ed. 2d 728, 113 S. Ct. 3042 (1993). Although "tax return" information is interpreted broadly, the alleged threats do not contain tax return information about May. Therefore, defendant's Motion for Summary Judgment as to the oral threats described in the Benson affidavit will be granted.

4. IRS Summonses that Failed to Comply with IRS Regulations

Plaintiff argues that the summonses served by the IRS were not attested properly. Plaintiff argues that because the summonses were improperly attested, the information provided in the summonses was disclosed without proper authority.

Improper attestation of a summons is not a ground for damages under § 7431. "Since all three of § 6103(k)(6)'s requirements for disclosure were met in this case, and since the Treasury regulations setting forth the conditions of disclosure under § 6103(k)(6) do not require the use of attested summonses, whether the summonses were properly attested is not relevant." *Barnes v. United States*, 17 F.3d 1428, (3d Cir. 1994) (emphasis added); *see also Simpson*, 92-1 U.S. Tax Cas. (CCH) P 50,077, 1991 U.S. Dist. LEXIS 19356 (N.D. Fla. 1991) ("As an exception to the general doctrine of sovereign immunity, Section 7431

must be strictly construed.").

Accordingly, defendant's Motion for Summary Judgment will be granted as to plaintiff's claim that the summonses issued during the investigation were not properly attested.

IV. Conclusion

For the stated reasons, it is ORDERED that:

1) defendant's Motion for Summary Judgment is granted as to plaintiff's claims under *26 U.S.C. § 7431*(a)(1) based on the following disclosures included in the IRS' audit letters:

(a) statements that May was subject to an official investigation;

(b) statements providing May's home address;

(c) statements that the IRS was investigating May for the years 1985, 1986, 1987, 1988, and 1989;

2) defendant's Motion for Summary Judgment is granted as to plaintiff's claims under 26 U.S.C. § 7431(a)(1) based upon the inclusion by the IRS of the words "Special Agent, criminal Investigation Division" in any written or oral communications, including letters, in person conversations, or telephonic conversations;

3) defendant's Motion for Summary Judgment is granted as to oral disclosures made by government agents, either in person or telephonically, during its investigation of May except as to those disclosures made to Jack May and Eula Holmes identified below;

4) plaintiff's Motion for Summary Judgment is granted as to the disclosures made by Agent Gary Marshall in April 1992 to Eula Holmes and Jack May in North Little Rock, Arkansas; and

5) defendant's Motion for Summary Judgment is granted on plaintiff's claim that, because the summonses were not properly attested, all disclosures made by the United States in summonses violated § 6103.

D. BROOK BARTLETT

UNITED STATES DISTRICT JUDGE

Kansas City, Missouri

October 5, 1995.

APPENDIX C

JOSEPH A. MAY, Appellant, v. UNITED STATES OF AMERICA, Appellee.

No. 97-1694WMKC

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

April 24, 1998, Filed

ORDER Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

ENTERED at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.